Supreme Court, U. S.
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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

No. 76- 76-1375

WILLIAM F. ZINGER,
Petitioner

v.

ROBERT W. BLANCHETTE, RICHARD C. BOND AND JOHN H. McARTHUR, Trustees of the Property of Penn Central Transportation Company, Debtor, and PENN CENTRAL TRANSPORTATION COMPANY,
Respondents

Petition for Writ of Certiorari to the Circuit Court of Appeals for the Third Circuit

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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1976

No. 76 -

WILLIAM F. ZINGER ,
Petitioner,

v.

ROBERT W. BLANCHETTE, RICHARD C. BOND, and JOHN H. McARTHUR, TRUSTEES OF THE PROPERTY OF PENN CENTRAL TRANSPORTATION COMPANY, DEBTOR; PENN CENTRAL TRANSPORTATION COMPANY,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

To the Honorable, the Justices of the said Court:

Petitioner, WILLIAM F. ZINGER, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Third Circuit entered on January 20, 1977 based on the facts and for the reasons stated herein.

OPINIONS BELOW

The findings of fact and conclusions of law and the judgment of the United States District Court for the Eastern District of Pennsylvania entered on December 23, 1975 are unreported and are appended hereto. The opinion of the United States Court of Appeals for the Third Circuit and judgment were entered on January 20, 1977; it is not yet reported and is appended.

JURISDICTION

The judgment of the United States Court of Appeals for the Third Circuit was entered on January 20, 1977. The jurisdiction of the Supreme Court is based on 28 U.S.C. par. 1254 (1).

Jurisdiction in the United States District Court in the first instance was based on the Age Discrimination in Employ-

ment Act of 1967, 29 U.S.C. par. 621 et seq.; the Interstate Commerce Act, 49 U.S.C. par. 16 (7) and 16 (12) ; equitable jurisdiction 28 U.S.C. par. 1651; generally concerning interstate commerce proceedings, 28 U.S.C. par. 1337; and for declaratory order 28 U.S.C. par. 2201.

QUESTIONS PRESENTED

1. Is a compulsory retirement plan with interim pension and exercisable at the option of the employer as to selected employees a subterfuge or does the plan violate the purpose of the Age Discrimination in Employment Act, the purpose of which is to make discrimination as to age unlawful?

2. Were the policies of early forced retirement applicable by their terms and did employee have a right to a hearing prior to compulsory retirement?

3. Did the lower court err in failing

to conclude that Appellant was an employee protected by the order of the Interstate Commerce Commission and as provided in Section 5 (2)(f) of the Interstate Commerce Act?

4. Did the lower court err in holding that the issues of mandatory injunction or declaratory judgment whether Appellant continued in his employment as employee until his age 65 were moot upon Appellant's actual attainment of age 65?

STATEMENT OF THE CASE

Petitioner instituted this action on September 20, 1974 against his employer, Penn Central Transportation Company and the Trustees of said Company. The Company was a debtor in proceedings under Section 77 of the Bankruptcy Act, in the Eastern District of Pennsylvania.

Plaintiff claimed relief by injunction on equitable grounds and damages for violation of an order of the Interstate Commerce Commission entered in merger proceedings of railroads into The Pennsylvania Railroad Company to form Penn Central Transportation Company.

Plaintiff also claimed said relief and damages for violation of the Age Discrimination in Employment Act of 1967, 29 U.S.C.par. 621.

Plaintiff further demanded declaratory

Petitioner is sometimes herein referred to as Plaintiff or Appellant; Respondent, as Defendant or Appellee.

judgment that his employee status was retained until he reached age 65.

Detailed facts are contained in the findings of the District Court, appended hereto, p. 22)

The violations resulted from employer's retiring Appellant, after 31 years of continued employment, only 7½ months prior to his becoming 65 years of age. The retirement age of 65 years was provided in the employer's plan for pension supplemental to that provided in the Railroad Retirement Act on his reaching 65 years of age. Appellant was a contributing member of this plan, having contributed over $6600 thereto. After merger, by reason of wage adjustments, contributions were not taken.

The merger of railroads into The Pennsylvania Railroad Company was approved by the Interstate Commerce Commission

pursuant to Section 5 (2) of the Interstate Commerce Act. 49 U.S.C. par. 5(2). The Commission's order of approval was conditioned, in accordance with the requirements of subsection (f) thereof, that the railroads "be required to provide employees not now covered and to the extent contemplated under section (5)(2)(f) of the act with the basic protection as particularly described in a contract entered into between labor organizations dated May 20, 1964." PRR Merger, 327 I.C.C.475, at 552.

The basic protection provided in the contract was that employees shall not be deprived of employment or "placed in a worse position with respect to compensation, rules, working conditions, fringe benefits or rights or privileges at any time during such employment." (Record, Vol. 3 Appendix, p. 157 at p. 159.)

The District Court concluded that Plaintiff was not an employee subject to the protective conditions imposed by the Interstate Commerce Commission. The Court of Appeals stated that it did not decide whether Appellant was an employee within the terms of the statute or the I.C.C. order and that even if the agreement covered Appellant, there was nothing which prohibits early retirement on interim pension by Company policy.

Plaintiff had filed a motion for preliminary injunction on September 26, 1974 which was denied. Plaintiff filed an appeal to the Court of Appeals on November 7, 1974, which appeal was dismissed as moot because plaintiff became 65 years of age.

There were three statements of policy for compulsory retirement, asserted by the employer, with interim pension. One was not distributed to employees and was unknown

by Appellant. It was conditioned on facts as to which Appellant was not given a hearing. The other two were made after the conditions of merger were recommended. Appellant contends that they were not provisions for compulsory retirement by their terms. (Record, Brief of Appellant, p. 20) If the retirement policies were applicable, then all employees including union employees will not be insured employment not to be ended without their consent, contrary to the recommended conditions adopted by the Commission.

These facts involve the general issue whether compulsory retirement before age 65 violates the Age Discrimination in Employment Act of 1967. Court of appeals cases in conflict with the decision of the Third Circuit here are: McMann v. United Air Lines, Inc., C.A. 4 Certiorari granted February 20, 1977; Dissent of Tuttle, Cir. J. in Brennan v. Taft Broadcasting 500 F. 2d 212,218.

REASONS FOR GRANTING THE WRIT

The opinion of the Court of Appeals in the case before this Court conflicts with the opinion of the Court of Appeals for the Fourth Circuit in McMann v. v. United Air Lines, Inc. in which this Court granted a writ of certiorari on February 20, 1977. The opinion and judgment involve important questions of law affecting a great number of employees and the public generally, particularly since interstate commerce is burdened thereby. The opinion conflicts with the position of the Secretary of Labor that retirement plans optional with the employer are unlawful.

The conflict results from the decision of the Court of Appeals in this case, in error, as contended by Petitioner, that Congress excluded from the Age Discrimination in Employment Act "retirements pur-

suant to bona fide retirement plans so long as the plan is not a subterfuge." (p. 57) The Court erred in failing to hold that retirement plans are subject to the same prohibition against discrimination with respect to age as apply to discharge because of age, or that compulsory retirement under the facts here involved was a subterfuge to evade the purposes of the Act. The Court erred in failing to hold that early retirement compulsory at the option of the employer was not observation of a retirement plan under Section 4 (f)(2) of the Act. It erred in deciding that the interpretation by the Secretary of Labor was incorrect. He had stated his Department's position that a plan is unlawful unless retirement is required by the terms of the plan and it is not optional.

Petitioner contends, with the support of the McMann decision, that retirement according to a retirement plan is

unlawful when that plan is discriminatory against an individual because of age.

A retirement plan is a condition of employment. Inland Steel Co. v. N.L.R.B. 170 F. 2d 247 at 255 (CA 7, 1949, per Major , Circuit Judge), Certiorari denied on pension issue, 336 U.S. 960.

A retirement plan discriminatory as to age is unlawful by Section 4 (a) (1) of the Age Discrimination in Employment Act, 29 U.S.C. par. 623.

The said Section 4 (a)(1) is as follows:

> "(a) It shall be unlawful for an employer—
> (1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;". (Underscoring supplied)

It is provided in Section 4 (f)(2) as follows:

> (f) It shall not be unlawful for an employer...—
>
> (2) to observe the terms of a bona fide seniority system or any bona fide employee benefit plan such as a retirement, pension, or insurance plan, which is not a subterfuge to evade the purposes of this chapter, except that no such employee benefit plan shall excuse the failure to hire any individual;"

In the McMann case the Court of Appeals reversed judgment of the District Court which held that retirement at age 60 under a retirement plan was lawful by the above subsection (f). That retirement under this subsection was subject to the prohibition against age discrimination was decided by the Circuit Court of Appeals. Winter, Circuit Judge said (p.66) :

> "United presented no evidence, however, to show that the provision of its plan requiring retirement

> at age 60 had any purpose other than arbitrary age discrimination."

The purpose of the Act is "to prohibit arbitrary age discrimination in employment". 29 U.S.C. par. 621 (a)(4).

The purpose of the Act is violated and the retirement plan is a subterfuge to evade the purpose, where the employer has not sustained his burden of proving that there was some reason other than age for a plan which discriminates between employees of different ages. This was so held in the McMann case. Petitioner contends that the burden is on the employer to establish that the plan in question does not discriminate among employees because of age.

In the McMann case the Court indicated that if a plan permitted retirement of an employee at the option of the employer, it was discriminatory as to age, and referred to the conclusion of Tuttle, Circuit

Judge in the Brennan case as follows:

(p. 66)

> "Arguably, if under a plan the employer has discretion not to retire an employee, the employee's discharge is not action taken 'to observe' the terms of the plan."

Petitioner contends that when the employer has the option or privilege of selection of the particular employees for early retirement against the desires of the employees to continue in employment, by asserting the provisions of Section 4 (f)(2) the employer is in direct violation of the purpose of the main provision of the Act, namely Section 4 (a)(1).

Petitioner concludes that observation of an optional retirement plan discriminatory as to age is not made lawful by Section 4 (f)(2) and that such retirement plan is a subterfuge.

The employment status of a great number of employees is affected. Winter, Circuit Judge, said in the McMann case,

(p. 77):

> "There are over eleven million employees who are members of retirement plans which require retirement before age 65; there are another several million who are members of plans which permit forced retirement before 65."

The Court of Appeals erred in deciding that the order of the Interstate Commerce Commission entered on merger of the employer pursuant to Section 5(2)(f) of the Interstate Commerce Act , 49 U.S.C. par. 5 (2)(f) did not prohibit optional forced early retirement.

The examiner for the Commission recommended approval of the merger on March 29, 1965 subject to protective conditions which correspond to those contained in the said order of the Commission. (Record, Vol. 3, p. 144) P.R.R. Merger , 327 I.C.C.

at 547, 552 (4/16/66).

It was provided in the order that the merging railroads " shall be required to provide employees not now covered and to the extent contemplated under Section 5 (2)(f) of the act with the basic protection as particularly described in a contract entered into between applicants and various labor organizations dated May 20, 1964."

The contract was entered into between the carriers and the unions pursuant to the last sentence of the section. On approval, this became the protective order under the first sentence of the Act. Norfolk & Western R. Co. v. Nemitz,404 U.S. 43 (1971). Justice Douglas said therein:

> "When there is a collective agreement and the Commission, as here, adopts or approves it, the 'notwithstanding' sentence of par. 5 (2)(f) is not, as suggested, read out of the Act. The collective agreement

> then becomes a 'condition' of the Commission's 'approval' of the consolidation under the first sentence of par. 5 (2)(f) and its provisions are deemed by the Commission to be 'a fair and equitable arrangement to protect the the interests'of the employees within the meaning of the first sentence. Thus, the significance of the 'notwithstanding' proviso is that it provides the machinery for the terms of a pre-merger collective agreement and thus supplies the minimum measure of fairness required under the first sentence of par. 5(2)(f)."

The basic protection required was provided in the second sentence of Section 5 (2)(f) as follows:

> "In its order of approval the Commission shall include terms and conditions... providing that such transaction will not result in employees of the carrier or carriers by railroad affected by such order being in a worse posi-

tion with respect to their employment..".

The basic protection of the Commission's order as provided in the said contract of May 20, 1964 was as follows: (Record, Vol. 3, p. 159)

> "On the date the said merger of Central into Pennsylvania is consummated the Merged Company will take into its employment all employees of Pennsylvania and Central as of the effective date of this agreement or subsequent thereto up to and including the date the merger is consummated who are willing to accept such employment, and none of the present employees of either of the said carriers shall be deprived of employment or placed in a worse position with respect to compensation, rules, working conditions, fringe benefits or rights and privileges pertaining thereto at any time during such employment."

Petitioner contends that his employment was insured by the order. Notwith-

standing this,the same issues as to prohibition of age discrimination by compulsory early retirement are involved.

Although the Commission said that "the intention of the Commission in the merger report was to protect all employees who were required to be protected", P.R.R. Merger, 347 I.C.C. 536 at 546 (1974), the Court of Appeals indicated that Petitioner was not an employee entitled to the protection.

Petitioner contends that he was an employee and his right of attrition by the Commission's order superseded any policy of the employer with respect to involuntary retirement.

Petitioner's monetary loss was $834.12 per year in supplemental pension and railroad retirement benefits, thus necessitating the declaratory judgment or mandatory injunction,the prayer of the complaint.

CONCLUSION

Wherefore, Petitioner prays that a Writ of Certiorari be granted and that the judgment and decision below be reversed.

RESPECTFULLY SUBMITTED:

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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

WILLIAM F. ZIMGER — CIVIL ACTION

V.

ROBERT W. BLANCHETTE, RICHARD C. BOND, and JOHN H. McArthur, Trustees of the Property of Penn Central Transportation Company, Debtor; PENN CENTRAL TRANSPORTATION COMPANY and PAUL R. DUKE — No. 74-2449

FINDINGS OF FACT AND
CONCLUSIONS OF LAW

GORBEY, J. December 23, 1975

FINDINGS OF FACT

1. - 44. Attorneys for Plaintiff and defendant submitted to this court at trial on November 25, 1975 forty-five (45) findings of fact which were agreed upon by counsel. For purposes herein, I adopt the first forty-four (44) facts in toto and incorporate them herein by reference and attach a copy hereto.

45. Plaintiff continued in his employment as an attorney until October 10, 1974, when he was placed on early retirement under PC's Interim Pension Plan.

46. The Interim Pension Plan is an established retirement plan of the former Pennsylvania Railroad, first begun in November, 1962. Following the merger of the Pennsylvania and New York Central Railroads to form Penn Central, the plan was continued.

47. Under the Interim Pension Plan, as applied to plaintiff in October, 1974, he was entitled to an amount equal to his estimated railroad retirement benefits, payable by the company. He was also eligible to receive, on application, a supplemental pension under the Supplemental Pension Plan. In addition, he was eligible for a pension payable by the Railroad Retirement Board which would be equal in amount to his interim pension.

48. As an attorney for PC, plaintiff had no individual contract of employment. His employment was for an indefinite term.

49.In approving the merger, the Interstate Commerce Commission, in its report and order of April 4, 1966, 327 I.C.C. 475, extended protection to non-agreement "employees" of the railroad to the extent required by Section 5 (2)(f)of the Interstate Commerce Act. This statute protects persons defined as employees or subordinate officials, as defined in orders of the Interstate Commerce Commission.

50. PC did not extend that protection to attorneys and other managers or officers of the company, but issued to them a statement of policy assuring that they would not be adversely affected by the merger. Said statement observed the right of the company to place any managers or officers between the ages of 60 and 65 on early retirement.

CONCLUSIONS OF LAW

1. This court has jurisdiction over the subject matter of this action under 29 U.S.C. pars. 621, et seq. and 28 U.S.C. par. 1343.

2. Defendants' "policy of interim pensions" which was adopted originally by the Pennsylvania Railroad Company in November, 1962 is applicable to plaintiff.

3. The aforesaid "policy of interim pensions" adopted prior to the enactment of the Age Discrimination in Employment Act of 1967, 29 U.S.C. pars. 621, et seq., is not a subterfuge to evade the purposes of the Act.

4. The aforesaid "policy of interim pensions" is a bona fide employee benefit plan within the meaning of 29 U.S.C. par. 623 (f)(2).

5. Plaintiff is not an "employee" subject to the protective conditions imposed by the Interstate Commerce Commis-

ion.

6. Plaintiff has not been discriminated against by defendants and is therefore not entitled to judgment in this matter.

PLAINTIFF'S REQUESTS FOR FINDINGS OF FACT AND CONCLUSIONS OF LAW

To the Honorable, James H. Gorbey, United States District Judge:

Plaintiff requests the Court to make the following

FINDINGS OF FACT

1. Plaintiff, William F. Zinger, resides at 277 Hathaway Lane, Wynnewood, Pa.

2. Plaintiff was 65 years of age on May 5, 1975.

3. Plaintiff was employed by The Pennsylvania Railroad Company since April 1,1943 and after the merger, with Penn Central Transportation Company until forced retirement, approximately eight months prior to his attaining the age of 65 years.

4. The Pennsylvania Railroad Company is a corporation of the Commonwealth of Pennsylvania and upon merger of New York Central Railroad Company into it, the name was changed and its present name is Penn Central Transportation Company.

5. Plaintiff's duties in his employment as attorney as part of the legal department of the Company, comprised acting as attorney at law in cases involving the Company in courts in the Eastern District of Pennsylvania, City and State Courts and before the Interstate Commerce Com - mission, furnishing legal opinions to the Freight Claim Agent in matters relating to loss and damage to freight, furnishing legal opinions to the Chief of Credit concerning liability for freight charges and instituting suits therefor at his discretion, and sending cases to the Company's attorneys pending in other jurisdictions.

6. Plaintiff did not determine policy, including institution or settlement of litigation.

7. Plaintiff was an employee-member of the Penn Central Transportation CompanyPlan for Supplemental Pensions in a non-agreement position.

8. Plaintiff had contributed approximately $6,600 into the Plan prior to the merger.

9. The retirement age under the plan for members in non-agreement positions was age 65.

10. The plan for supplemental pensions was approved by action of the Board of Directors of The Pennsylvania Railroad Company on April 27, 1938.

12. The action of the Board of Directors was authorized by action of the stockholders of The Pennsylvania Railroad Company at their annual meeting on April 9, 1935.

13. The Plan for Supplemental Pension

as amended to January 1974 was approved by the Board of Directors of Penn Central Transportation Company.

14. Retirement age was provided in the Plan as follows:

"Retirement ages shall be as follows:

"I- For members of non-agreement positions: age 65."

15. There was no provision in the said pension plan for compulsory retirement at the option of the Company.

16. By order No. 1087 dated January 26, 1973, the said United States District Court authorized the trustees to continue the plan in effect, the trustees having been appointed in reorganization proceedings under Section 77 B of the Bankruptcy Act in the District Court for the Eastern District of Pennsylvania, No. 70-347.

17. In the memorandum in said order No. 1087 the Court said with respect to

interim or early retirement plans:

> "Interim or Early Retirement Plan. This program is designed to facilitate the retirement of selected employees at age 60, rather than at age 65, by assuring total pension benefits equivalent to those which would have been received had retirement been postponed until age 65. Granting of such early retirement is discretionary with the company...
> "Implementation of the early retirement programs produces significant overall economies, making it possible to consolidate certain positions, or to replace highly paid employees with younger, less highly paid substitutes. ..."

18. Plaintiff obtained in these proceedings a temporary injunction of this Court against retirement on October 1,1974 which injunction was dismissed on October 11, 1974.

19. As a result of this legal proceeding, Plaintiff's pension was reduced for reasons stated by the administrative offi-

cer of the Department by letter dated October 18,1974, as follows:

> "You will note that the amount of pension under the Plan is now $538.60 per month. The reason for this is that the pension under the plan is based on your average compensation per month in the five years of service prior to your retirement date under the plan (November 1, 1974), and since by virtue of Judge Weiner's order you performed compensated service in October, 1974, that month is included in the 5 year period. Since you worked and were paid for only part of the month of October, your average monthly compensation for the 5 year period is less than it would have been if you had retired effective October 1, 1974, and under the Plan's provisions your pension is therefore representative of the lower average monthly compensation."

20. Plaintiff continued to perform his service with the Company until October 11, 1974, when the said administrator ordered him not to do so.

21. Plaintiff did not apply for railroad retirement payments until after he became 65 years of age.

22. Plaintiff accepted interim payments from the Company without prejudice, as agreed, to his contention that he remained an employee of the Company until age 65.

23. By reason of retirement on October 11, 1974 rather than at age 65, pension determined by the Company under the Plan and Railroad Retirement payments were $834.12 less per year.

24. By agreement pursuant to Section 5 (2) (f) of the Interstate Commerce Act, dated May 20, 1964 between the Presidents of the merging corporations and various signatory unions entitled "Agreement for Protection of Employees in the event of Merger of Pennsylvania and New York Central Railroads", it was provided, inter alia, as follows with respect to Section 5(2)(f) protection of employment under the Inter-

state Commerce Act:

"(b) On the date the said merger of Central into Pennsylvania is consummated the Merged Company will take into its employment all employees of Pennsylvania and Central as of the effective date of this agreement or subsequent thereto up to and including the date the merger is consummated who are willing to accept such employment, and none of the present employees of either of said Carriers shall be deprived of employment or placed in a worse position with respect to compensation, rules, working conditions, fringe benefits or rights and privileges pertaining thereto at any time during such employment."

25.On March 29, 1965, in Finance Docket of the Interstate Commerce Commission No. 21989, Pennsylvania Railroad Company- Merger- New York Central Railroad Company, the examiners filed their recommended report and order approving the merger subject to conditions including the following in Appendix U to the report:

"The Pennsylvania New York Central Transportation Company shall be required to provide employees not now covered and to the extent contemplated under section 5 (2)(f) of the act with the basic protection as particularly described in a contract entered into between applicants and various labor organizations dated May 20,1964..."

26. The said examiners reported, at p. 144,

"Of record, applicants indicated that such provisions would be made available to all of the merged company's employees whom the Commission must consider in evaluating the effects of the proposed merger."

27. One week after the Recommended Report was served,Stuart T. Saunders,Chairman of the Board of Pennsylvania Railroad Company sent letter dated April 5,1965 to non-agreement employees including Plaintiff. The letter was addressed to "PRR supervisors, managers and officers" and it was stated that "the basic personnel pol-

icies for persons not subject to union agreements" were contained in the attached page.

23. Application of the letter to Plaintiff was stated therein as follows:

> "You will note from Section I, which applies to you, that non-agreement supervisors, managers, and officers will be offered continued employment until they retire..."

29.The title to and Section I of the policy statement attached to said letter were as follows:

> "Summary of Employee Conditions Affecting Non-Agreement Employees Subject to the Interstate Commerce Commission Order Approving Merger of the Pennsylvania and New York Central Railroads
>
> (1) Non-agreement employees will not be deprived of employment, have their compensation reduced, or be excluded from fringe benefits as the result of merger until retirement, resignation, death or removal for cause..."
> (remaining sentence concerns furlough)

30. There was no statement therein concerning compulsory retirement at the option of the Company.

31. The merger was approved by the Interstate Commerce Commission on April 6, 1966, 327 I.C.C. 475 and the said contract with the unions was applied as compliance with the requirement of Section 5 (2) (f) for protection of all employees, as stated by the Commission in its report,as follows, at p. 545:

> "Accordingly and in view of the applicant's willingness to extend the benefits to all employees, we have adopted the plan as a package in the unique circumstances of this case."

32. By letter dated February 19,1968, Guy W. Knight, Senior Vice President, sent to employees including Plaintiff, stated that "It is a pleasure to reaffirm the Personnel Policy for Merger which applies to you" which "is on the reverse side of this letter."

33. The said letter was addressed "To Management Employees Provided for by the Personnel Policy for Merger of the Pennsylvania and New York Central Railroads."

34. The policy stated on the reverse side of the letter was headed "Personnel Policy for Merger of the Pennsylvania and New York Central Railroads Applying to Management Employees Not Subject to the Employee Conditions Provisions of the Interstate Commerce Commission Order Authorizing the Merger".

35. In a prefatory paragraph it was stated therein that "these policies will apply to managers and officers not subject to the provisions of the ICC Order.

36. The policy was the same as that contained in the statement of Stuart T. Saunders, Chairman of the Board with two exceptions:

(1) The policy related to "such

manager or officer" rather than to "non-agreement employees", and

(2) The addition of the following paragraph with respect to interim allowances:

> "E. The company may elect to retire any such person between ages 60 and 65 and he, as well as any such person over 60 years of age who is unwilling to relocate or accept a position in a new field of endeavor, will be provided interim pension allowances that will enable him to be retired with benefits equal to that he would receive at 65 with the same amount of service."

37. On or about March 1, 1974, General Counsel for Penn Central Transportation Company verbally stated to Plaintiff that he would be retired on June 1, 1974 and handed Plaintiff a paper containing a typewritten form in which it was acknowledged that the employee conditions of the merger order of the Commission did not apply to Plaintiff, but Plaintiff refused to sign

the form as he had requested.

38. Plaintiff received no other statement of policy, including any policy of interim pension and he has no knowledge or information of any policy of interim pensions based on voluntary or involuntary retirement.

39. Defendant's Exhibit 3 at the hearing on Plaintiff's application for preliminary injunction purporting to be policy of interim pensions,was not dated and did not purport to be issued by anyone, was not distributed to employees including Plaintiff and Plaintiff had no knowledge of it.

40. The retirement of Plaintiff was postponed to October 1, 1974 but Defendants refused to cancel the proposed retirement because of exceptional circumstances of inequity and undue personal hardship which was an exception to the policy as stated by Guy W. Knight.

41. Plaintiff was not given a hearing at any time concerning his retirement.

42. Plaintiff gave notice of intention to file this civil action against Defendants in accordance with law including 29 U.S. Code Par. 626.

43. Plaintiff received letter dated July 29,1974, from the area director of the United States Department of Labor, Employment Standards Division, stating that in accordance with Plaintiff's said notice a compliance officer of the Department of Labor met with Defendant Paul R. Duke and was unsuccessful in attempting to eliminate the said practice by informal conciliation,conference, or persuasion.

44. Employees subject to the Union Contract dated May 20, 1964, have not involuntarily been retired early by the Penn Central Transportation Company.

ORDER

AND NOW, this 23rd day of December, 1975, pursuant to the Findings of Fact and Conclusions of Law filed this date in the above matter, it is hereby ORDERED that judgment is entered for defendants and against Plaintiff.

BY THE COURT:

James H. Gorbey
U.S. District Judge

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 76-1249

WILLIAM F. ZINGER,

Appellant

v.

ROBERT W. BLANCHETTE, RICHARD C. BOND AND JOHN H. McARTHUR, Trustees of the Property of Penn Central Transportation Company, Debtor, and PENN CENTRAL TRANSPORTATION COMPANY,

Appellees

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

(D.C. Civil No. 74-2449)

Argued October 8, 1976

Before: ADAMS, KALODNER * and WEIS, *Circuit Judges.*

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* Although Judge Kalodner was not present at oral argument, counsel, by consent, agreed to his participation in the decision and Judge Kalodner reviewed the record of oral argument.

OPINION OF THE COURT

(Filed January 20, 1977)

WEIS, *Circuit Judge.*

Acknowledging the inexorable march of time but unwilling to leave his employment before the customary age of 65, the plaintiff contests his involuntary retirement one year earlier. He contends that an agreement by his employer preceding the formation of the Penn Central Railroad and the Age Discrimination in Employment Act both proscribe his premature retirement. Consequently, he seeks to augment his pension to what it would have been had he remained in service until he reached 65. Though he argues vigorously, we conclude that he cannot prevail on either of his contentions and, therefore, we must affirm the district court's judgment for the defendants.

Only months before his sixty-fifth birthday and despite his protests, the Penn Central Transportation Company retired plaintiff Zinger, making him eligible for pension benefits from several sources, including the Railroad Retirement Fund. However, these payments total $834.12 less per year than he would have received had he continued to work for Penn Central until age 65.

Zinger began working for the Pennsylvania Railroad Company in 1943, and continued without interruption in the service of its successor, the Penn Central. He served as an attorney in the legal department of the company on a salary basis, and appeared for the railroad in proceedings in the courts as well as before the Interstate Commerce Commission. His efforts were directed chiefly toward claims for freight loss and damage, and did not extend to matters of company policy or the discretion to institute litigation.

Zinger had been a contributing member of the Plan for Supplemental Pensions first put into effect by the Pennsylvania Railroad in 1938 and later amended by the Penn Central in 1974.[1] The Plan provided for payment of pension benefits in addition to those afforded by the Railroad Retirement Act. In 1962, the Pennsylvania Railroad also adopted an "Interim Pension Policy" to pay benefits to those employees retiring before 65, when payments began under the Railroad Retirement Act.

In the preliminary negotiations for the Pennsylvania and New York Central merger, management agreed with the unions to provide extensive job protection for their members. In the course of ICC hearings, concerned in part with the fate of employees who would be affected by the merger, the companies stated that they would extend those benefits to non-union ("non-agreement") personnel as well. The Commission approved the protective agreement as "fair and equitable" to both union and "non-agreement" employees but required the latter group to accept the terms and conditions of the agreement in writing.[2]

On April 5, 1965, the chairman of the board of the Pennsylvania Railroad sent a letter addressed to "PRR Supervisors, Managers, and Officers" explaining some effects of the merger. Mr. Zinger was one of the persons who received this communication. In the body of the letter, the chairman wrote:

> "You will note from Section I, [of the attachment] which applies to you, that non-agreement supervisors, managers, and officers will be offered continued employment until they retire, ..."

The attached document, captioned "Personnel Policy for Merger of the Pennsylvania and New York Central Railroads Applying to Supervisors, Managers, Officers and

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1. After the merger with the New York Central Railroad, plaintiff was no longer required to make contributions to the fund.

2. *See* Pennsylvania Railroad Company-Merger-New York Central Railroad Company, 327 ICC 475, 544-545. The record does not disclose whether the acceptance in writing condition was enforced.

other Employees Not Subject to Agreement with Unions,"[3] listed two classifications of personnel not subject to the union agreement: "I. Supervisors, Managers, and Officers" and "II. Other Employees Not Subject to Agreements with Unions." Paragraph E under the first category read:

> "The company may elect to retire any such person between ages 60 and 65 and he, as well as any such person over 60 years of age who is unwilling to relocate or accept a position in a new field of endeavor, will be provided interim pension allowances . . . ."

On February 19, 1968, soon after consummation of the Penn Central merger, the senior vice president sent a letter to "Management Employees Provided For by The Personnel Policy for Merger of the Pennsylvania and New York Central Railroads." This letter, sent to Mr. Zinger among others, stated in part: "[I]t is a pleasure to reaffirm the Personnel Policy for Merger which applies to you." The policy was reprinted on the reverse side and read in part: "[T]hese policies will apply to managers and officers not subject to the provisions of the ICC Order." Included was a provision for early retirement at the company's election set out in the same verbiage as in the letter of April 5, 1965.

On March 1, 1974, the general counsel for Penn Central told plaintiff that he would be retired very shortly. After Zinger protested and commenced this litigation, his retirement was postponed to October 1, 1974, seven months before his 65th birthday.

In the district court, plaintiff asked for injunctive relief and damages, asserting that as a "non-agreement employee" he could not be involuntarily retired. In addition,

3. There is some confusion about this exhibit in the record. The plaintiff's proposed findings of fact rely upon a different attachment, and the district court did not clarify the situation when it made its findings of fact. In his post-trial brief in the district court, the plaintiff said, "Plaintiff is therefore basing his case on the printed statement which defendants claim was or should have been attached." We rely upon the contents of the exhibit as reprinted in the appendix filed in this case at page 102a. This version is the one that defendant asserts to be the proper attachment and the one to which plaintiff refers in his brief at pages 20-25.

he alleged that the early retirement plan violated the Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621 *et seq.* The district court rejected both contentions, and entered judgment for the defendants.

Plaintiff's position, as we understand it, is that, as a salaried employee of the railroad, he was entitled to the benefits of the protective agreement approved by the ICC as a condition of the merger. He argues that since the ICC is required to protect the interests of all affected railroad employees in the event of a merger, *see* 49 U.S.C. § 5(2)(f), and "employee" is not defined in the statute, the word should be given its ordinary meaning—one that would include a person in his position. In response, the defendants argue that managers and professional personnel are simply not "employees" within the meaning of § 5(2)(f) and there was no intention to include them in the protective agreement.

Before reaching the question of whether plaintiff was covered by the protective agreement, however, we think it important to determine whether its provisions have the effect Mr. Zinger urges. We conclude that they do not.

The plaintiff cites language in the union protective agreement of May 20, 1964 providing that, upon merger, employees of the Pennsylvania Railroad shall be continued in service "and none of the present employees . . . shall be deprived of employment or placed in a worse position with respect to compensation, rules, working conditions, fringe benefits or rights and privileges pertaining thereto at any time during such employment." Mr. Zinger apparently contends that the company's action in retiring him before age 65 was a deprivation of employment. However, the agreement states, "[a]n employee shall not be regarded as deprived of employment or placed in a worse position . . . in case of his . . . retirement . . . ."

The plaintiff also points to a factual stipulation that "[e]mployees subject to the Union Contract dated May 20, 1964, have not involuntarily been retired early by the Penn

Central Transportation Company." That fact, however, does not of itself establish a contractual undertaking under the terms of the protective agreement. All that the record shows is that the ICC order and the offer of the railroads were limited to the terms of the May 20, 1964 writing. There was no understanding that unspecified provisions of other union collective bargaining agreements or practices would be incorporated and applied to non-union employees.

After a careful review of the evidence, we find nothing to show that the protective agreement, even if it covers plaintiff, prohibits the early retirement on a pension otherwise permitted by company policy.

Since he has failed to prove any breach of the protective agreement, we need not decide whether the plaintiff would be considered an "employee" within the terms of the statute or the ICC order. We doubt that he would on the record here because of the lack of evidence to establish the meaning which the railroads and the ICC placed upon the word in their negotiations. Our research and that of counsel has not uncovered any authoritative court decision or ruling of the ICC in which a person in Mr. Zinger's capacity has been considered an "employee" under § 5(f) of the Interstate Commerce Act. Accordingly, we would expect discussion and a specific designation in the proceeding and order if such an unusual result were desired.[4] What evidence there is in this case tends to show an intention to

4. In Norfolk v. W. Railway Co. and New York C & STLR Company Merger, 330 ICC 780 (1967), the Commission stated:

> "We deny the requests of D & H and B & M to extend employee protection to their supervisory, professional and executive personnel. The term 'employee' is not defined in the Interstate Commerce Act.
>
> • • •
>
> "[T]he record is silent with respect to the cost of protection if it were extended to supervisory, professional and executive personnel. Absent evidence of the effect of this transaction upon such personnel and of their need for protection, *e.g.*, the transferability of their skills, Amalgamated Transit Union v. United States, 253 F. Supp. 481, *aff'd per cur.* 385 U.S. 38 (1966), we would not be justified in providing protective conditions for these personnel." 330 ICC at 825, 826.

Though not relevant to a decision on the legal issues, we learned at oral argument that Mr. Zinger was employed by an industry association soon after his retirement by the Penn Central.

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exclude, but since the record is not as complete as it might be, we think it better practice not to issue a definitive ruling. Accordingly, since the record does not demonstrate a breach of the protective agreement, the plaintiff has failed to meet the burden of proof on that issue, and the district court's finding in favor of the defendants was not erroneous.

II.

Disposition of the protective agreement issue, however, does not end the case. As an alternative, Zinger contends that the Penn Central program authorizing involuntary retirement between the ages of 60 and 65 violates the Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621 *et seq.* He asserts that the early retirement provision, although bona fide, is a "subterfuge" and, hence, not within the exception described in 29 U.S.C. § 623(f):

> "It shall not be unlawful for an employer, employment agency, or labor organization—
>
> • • •
>
> "(2) to observe the terms of a bona fide seniority system or any bona fide employee benefit plan such as a retirement, pension, or insurance plan, which is not a subterfuge to evade the purpose of this Act, except that no such employee benefit plan shall excuse the failure to hire any such individual."

The railroad argues that since the early retirement plan predated the Act, it cannot be considered a subterfuge. We believe this chronological argument lacks merit, and the mere fact that the plan was in existence before the Act was passed is not determinative. The statute speaks of evading the "*purposes*" of the Act—not the Act itself. Thus, a seniority practice or employee benefit plan effective long before the enactment of the statute could, nevertheless, be opposed to its purposes and thus be a subterfuge. Further, the legislative history is contrary to defendant's

position. The House Report, in discussing this particular clause, states:

> "It is important to note that exception (3) [the present (2)] applies to new and existing employee benefit plans, and to both the establishment and maintenance of such plans. This exception serves to emphasize the primary purpose of the bill—hiring of older workers—by permitting employment without necessarily including such workers in employee benefit plans. The specific exception was an amendment to the original bill, is considered vita [sic] to the legislation, and was favorably received by witnesses at the hearings." H.R. Rep. No. 805, 90th Cong., 1st Sess. (as found in 1967 U.S. Code Cong. and Adm. News p. 2217)

To this extent, we agree with the conclusion of the United States Court of Appeals for the Fourth Circuit in *McMann v. United Air Lines, Inc.*, 542 F.2d 217 (4th Cir. 1976), and, accordingly, reject the defendants' chronological argument. *But see Brennan v. Taft Broadcasting Co.*, 500 F.2d 212 (5th Cir. 1974); *deLoraine v. MEBA Pension Trust*, 499 F.2d 49 (2d Cir.), *cert. denied*, 419 U.S. 1009 (1974); *Steiner v. National League of Professional Baseball Clubs*, 377 F. Supp. 945 (C.D. Cal. 1974).

Plaintiff's contention is that the Act proscribes involuntary retirement before 65. In a far reaching decision, *McMann v. United Air Lines, Inc., supra*, the Court of Appeals for the Fourth Circuit held that the Act, by implication, outlaws all programs providing for involuntary retirement before age 65, whether at the company's option or under mandatory provisions. However, in *Brennan v. Taft Broadcasting Co., supra*, the Fifth Circuit held that a bona fide plan providing benefits upon involuntary retirement at age 60 was not a subterfuge and therefore permissible under the Act.

Confronted with diametrically different interpretations by two highly respected courts, we must independently examine the Act and its legislative history.

29 U.S.C. § 623[5] makes it unlawful to *discharge* an individual because of age. No statutory provision explicitly prohibits early retirement on pension. Only two sections mention "retirement": § 623(f)(2) which exempts observance of a bona fide retirement program; and § 624 which requires the Secretary of Labor to study the institutional arrangements giving rise to involuntary retirement and to report his findings, together with any legislative recommendations, to the President and to Congress.

The primary purpose of the Act is to prevent age discrimination in hiring and discharging workers. There is, however, a clear, measureable difference between outright discharge and retirement, a distinction that cannot be overlooked in analyzing the Act. While discharge without compensation is obviously undesirable, retirement on an adequate pension is generally regarded with favor.[6] A careful examination of the legislative history demonstrates that, while cognizant of the disruptive effect retirement

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5. Prohibition of Age Discrimination

Sec. 4(a) It shall be unlawful for an employer—

(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;

(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age; or

* * *

(f) It shall not be unlawful for an employer . . . —

(1) to take any action otherwise prohibited under subsections (a), (b), (c), or (e) of this section where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business, or where the differentiation is based on reasonable factors other than age;

(2) to observe the terms of a bona fide seniority system or any bona fide employee benefit plan, which is not a subterfuge to evade the purposes of this Act, except that no such employee benefit plan shall excuse the failure to hire any individual; or

(3) to discharge or otherwise discipline an individual for good cause.

Act of December 15, 1967, Pub. L. No. 90-202 § 4, 81 Stat. 602, 603-604.

6. *See* generally, Hearings on Early Retirement and Related Subjects Before the Subcomm. on Retirement and the Individual of the Senate Special Comm. on Aging, 90th Cong., 1st Sess., pt. 2 (1967). *Cf.* Mandatory Retirement: The Law, The Courts, and The Broader Social Context, 11 Willamette L.J. 398 (1975).

may have on individuals, Congress continued to regard retirement plans favorably and chose therefore to legislate only with respect to discharge.

In his message of January 23, 1967, the President recommended legislation covering workers from ages 45 to 64 and "provided an exception for special situations . . . where the employee is separated under a regular retirement system." 113 Cong. Rec., pp. 1089-1090. As referred to committee, both Senate and House Bills provided:

> "Sec. 4(f) It shall not be unlawful . . .
>
> (2) to separate involuntarily an employee under a retirement policy or system where such policy or system is not merely a subterfuge to evade the purposes of this Act."

Senator Javits recognized that actuarial considerations in the administration of pensior plans might hinder employment of older workers. As he said to the Senate subcommittee:

> "Now, another problem is the operation of established pension plans, some of which provide benefits based to a certain extent on the age of the employee when first hired.
>
> "The administration bill, which permits involuntary separation under bona fide retirement plans meets only part of the problem. It does not provide any flexibility in the amount of pension benefits payable to older workers depending on their age when hired, and thus may actually encourage employers, faced with the necessity of paying greatly increased premiums, to look for excuses not to hire older workers when they might have hired them under a law granting them a degree of flexibility with respect to such matters. That flexibility is what we recommend.
>
> • • •

> "So, Mr. Chairman, in order to meet these needs, I will introduce the following amendments to S. 830.
>
> • • •
>
> "Third, that a fairly broad exemption be provided for bona fide retirement and seniority systems which will facilitate hiring rather than deter it and make it possible for older workers to be employed without the necessity of disrupting those systems."[7]

Following this statement, Secretary of Labor Wirtz testified:

> "There is also the effort in S. 830 to make quite clear the relationship which would necessarily be recognized between unjust discrimination and the retirement policies or systems to which Senator Javits has already referred . . . Section 4(a) reflects . . . simply the significant fact that *what we are doing here is to extend to individuals in situations not covered by collective bargaining agreements or established retirement policies,* a degree of protection against discrimination on the basis of age very much like what has evolved in private experiences and programs."[8] (Emphasis supplied)

When asked about the effect of the proposed legislation on existing pension and insurance plans, Secretary of Labor Wirtz replied:

> "It would be my judgment . . . that the effect of the provision in 4(f)(2) [the original bill] . . . is to protect the application of almost all plans which I know anything about . . . . It is intended to protect retirement plans."[9]

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7. Hearings on S. 830 Before the Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare, 90th Cong., 1st Sess., at 27-28 (1967).
8. *Id.* at 43.
9. *Id.* at 53.

Representatives of organized labor expressed reservations about § 4(f)(2) at the subcommittee hearings in both houses. As a legislative director for the AFL-CIO testified:

> "We likewise do not see any reason why the legislation should, as is provided in section 4(f)(2) in the Administration bill, permit involuntary retirement of employees under 65 . . . . Involuntary retirement would be forced, *regardless of the age of the employee,* subject only to the limitation that the retirement policy or system in effect may not be merely a subterfuge to evade the Act."[10] (Emphasis supplied)

These witnesses later submitted proposed amendments to strike the provision allowing separation under a retirement policy.[11]

However, the union representatives were not successful in their efforts to remove the retirement provision from the bill, although the protection for seniority systems which they advocated was incorporated in the same section of the Act.

While the present form of § 4(f)(2) differs slightly from its original form in the Senate and House bills, we do not regard the difference as important. In commenting on the amendments which incorporate the present language

10. Testimony of Andrew J. Biemiller, Director of Department of Legislation, AFL-CIO, Hearings on S. 830 Before the Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare, 90th Cong., 1st Sess., at 96. *See also* pp. 93, 98, 100. *See also* testimony of Kenneth A. Meiklejohn, legislative representative AFL-CIO, Hearings on H.R. 3651, H.R. 3768, and H.R. 4221 Before the General Subcomm. on Labor of the House Comm. on Education and Labor, 90th Cong., 1st Sess., at 411, 418. The testimony of both men took place after Senator Javits had proposed his amendments. It is obvious that the union representatives thought that the Javits' amendment did not exclude involuntary early retirement.

11. The proposed amendment was titled "Amendment to Eliminate Provision Permitting Involuntary Retirement From the Age Discrimination in Employment Act, and to Substitute Therefor Provision Safeguarding Bona Fide Seniority or Merit Systems." It would have deleted any reference in the exception to retirement plans, and thus have made age 65 applicable to them as it was to other forms of discrimination. For a discussion of the effect to be given committee proceedings, *see* National Railroad Passenger Corp. v. National Assn. of Railroad Passengers, 414 U.S. 453, 460–461 (1974).

of the Act, Secretary of Labor Wirtz, in testifying before the House committee, stated:

> "In the bill reported out by the subcommittee in the Senate there is a change in the language which refers to this point which you raised earlier, the relationship of this to established pension plans. We count that charge as not going to the substance and involving matters going to clarification which would present no problem."[12]

Further, the text of the adopted amendment, "to observe the terms of any bona fide employee benefit plan such as a retirement, pension or insurance plan, which is not a subterfuge to evade the purposes of this chapter," is quite similar to that of the New York statute. That Act provides that its prohibition against age discrimination shall not "affect the retirement policy or system of any employer where such policy or system is not merely a subterfuge to avoid the purposes of said subdivision . . . ." Pennsylvania has a similar statute, Pa. Stat. Ann. tit. 43 § 955, and New Jersey's reads: ". . . nor to interfere with the operation of the terms or conditions and administration of any bona fide retirement, pension, employee benefit or insurance plan or program." New Jersey Stat. Ann. 10:5-2.1. These statutes were introduced into the record at the hearings[13] and were received with interest by the committees. Also introduced were New York's explanatory notes. They unequivocally stated that a plan formulated before enactment of the statute providing for compulsory retirement on pension at age 60 was lawful. When no retirement benefits were provided, however, the bona fides of the plan was subject to examination.[14]

The former Secretary of Labor obviously thought that bona fide retirement programs permitting involuntary re-

12. Hearings on H.R. 4221 Before the General Subcomm. on Labor of the House Comm. on Education and Labor, 90th Cong., 1st Sess., at 40.

13. Hearings on S. 830 Before the Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare, 90th Cong., 1st Sess., at 304, 306 (1967).

14. *Id.* at 251.

tirement before age 65 were exempted from the Act. The interpretive bulletin, 29 C.F.R. § 860.110, issued by the Department of Labor soon after enactment of the statute reads:

> "Thus, the Act authorizes involuntary retirement irrespective of age, provided that such retirement is pursuant to the terms of a retirement or pension plan meeting the requirements of section 4(f)(2). The fact that an employer may decide to permit certain employees to continue working beyond the age stipulated in the formal retirement program does not, in and of itself, render an otherwise bona fide plan invalid insofar as the exception provided in section 4(f)(2) is concerned.
>
> "(b) This exception does not apply to the involuntary retirement before 65 of employees *who are not participants in the employer's retirement or pension program.* It should be noted that section 5 of the Act directs the Secretary of Labor to undertake an appropriate study of institutional and other arrangements giving rise to involuntary retirement, and report his findings and any appropriate legislative recommendations to the President and to Congress."[15] (Emphasis supplied)

The bulletin demonstrates the Secretary's recognition of the difference between retirement with and without a pension; the financial effect of the latter being the same as outright discharge. Succeeding Secretaries, however, have

15. 34 F.R. 9709, June 21, 1969. The text has remained unchanged through the 1975 edition of the Code of Federal Regulations despite the Secretary's change in position. *See* 29 C.F.R. § 860.110.

A working paper prepared for the Senate Special Committee on Aging commented that the study on involuntary retirements had not been completed. It suggested that the Secretary could be asked to prepare a report on whether early involuntary retirement should be continued as an exception and, if so, whether such factors as age and amount of reduced retirement benefits should be considered. STAFF OF SENATE SPECIAL COMMITTEE ON AGING, 93d Cong., 1st Sess. WORKING PAPER ON IMPROVING THE AGE DISCRIMINATION LAW (Comm. print 1973, p. 18).

revised the Department's position. Pursuant to the statutory directive, the Secretaries have submitted annual reports to Congress through 1976 discussing plans that mandate retirement before age 65. In the report of January 31, 1976, Secretary Brennan articulated the department's position:

> "[R]etirements [before 65] are unlawful unless the mandatory retirement provision: (1) is contained in a bona fide pension or retirement plan, (2) is required by the terms of the plan and is not optional, and (3) is essential to the plan's economic survival or to some other legitimate purpose—*i.e.*, is not in the plan for the sole urpose [sic] of moving out older workers, which purpose has now been made unlawful by the ADEA."[16]

This is the interpretation that the Secretary urged upon the courts in both *Brennan v. Taft Broadcasting Co., supra,* and *McMann v. United Air Lines, Inc., supra.*

In adopting this stance, the Secretary ignored the obvious and important distinction implicit in his previous bulletin between discharge without pay and retirement on a pension. Moreover, the Secretary's latter day position is not only contrary to that taken by his predecessor contemporaneously with the consideration and passage of the Act, but also to the views of the Congressional committees which declined that proposal when it was forthrightly presented to them. Thus, rather than proposing an amendment to Congress, as Congress had instructed, the Secretary seeks to change the Act by court decision or administrative fiat.[17]

16. Dept. of Labor, January 1975 report pertaining to activities in connection with the Age Discrimination in Employment Act of 1967, at 17 (1975).

17. The Supreme Court was confronted with a similar situation in General Electric v. Gilbert, — U.S. —, 45 U.S.L.W. 4031, 4036 (U.S. Dec. 7, 1976), when it said:

> "The EEOC guideline in question does not fare well under these standards. It is not a contemporaneous interpretation of Title VII, since it was first promulgated eight years after the enactment of that Title. More importantly, the 1972 guideline flatly contradicts the position which the agency

There are many cogent, persuasive arguments why involuntary retirement, even with an adequate pension, should not be permitted before age 65.[18] Logically, allowing such a broad exemption may be inconsistent with the prohibition against discrimination in hiring and produce the anomaly that a person who has been involuntarily retired by one company before 65 may not be discriminated against in applying for employment at another company.[19] Similarly, as the Secretary suggests, there may be serious objections to allowing retirement to be at the company's option. As writ'e. however, the statute does not limit its exemption for bona fide plans to those meeting the Secretary's three criteria.

Such arguments miss the mark when urged upon a court in support of a statutory interpretation. An exemption's merits are properly matters of legislative concern and evaluation. Congress has chosen to exclude retirements pursuant to bona fide retirement plans so long as the plan is not a subterfuge. That choice is binding upon us. As the Supreme Court recently noted, "the drawing of lines that create distinctions is peculiarly a legislative task and

17. (Cont'd.)
had enunciated at an earlier date, closer to the enactment of the governing statute.

* * *

"We have declined to follow administrative guidelines in the past where they conflicted with earlier pronouncements of the agency. [citations] In short, while we do not wholly discount the weight to be given the 1972 guideline, it does not receive high marks when judged by the standards enunciated in *Skidmore* [v. Swift & Co., 323 U.S. 134 (1944)]."

18. *See* Levien, The Age Discrimination in Employment Act: Statutory Requirements and Recent Developments, 13 Duq. L.R. 227 (1974); Agatstein, The Age Discrimination in Employment Act of 1967: A critique, 19 N.Y. L.F. 309 (1973); *cf.* The Constitutional Challenges to Mandatory Retirement Statutes, 49 S.J. L.R. 748 (1975); Age Discrimination in Employment: Correcting a Constitutionally Infirm Legislative Judgment, 47 S. CAL. L. REV. 1311 (1974); *But see,* Massachusetts Board of Retirement v. Murgia, 44 U.S.L.W. 5077 (U.S. June 25, 1976).

19. In McMann v. United Air Lines, Inc., supra, the court of appeals reasoned that there is no difference between a mandatory retirement at age 62 and a refusal to hire a person that age, citing Hodgson v. American Hardware Mutual Ins. Co., 329 F. Supp. 225 (D. Minn. 1971). However, the opinion did not note that in the cited case the district court ruled on the "retirement" of the complainant who did not participate in the pension plan and those who did were held to be within the exception of §4(f)(2).

an unavoidable one." *Massachusetts Board of Retirement v. Murgia,* 44 U.S.L.W. 5077, 5079 (U.S. June 25, 1976).

We leave to congressional consideration the broad policy questions underlying the desirability of regulating the minimum age for compensated involuntary retirement. Factors such as the population's gradually increasing average age and the proper methods of insuring the stability of the Social Security Plan may argue for an even higher retirement age. On the other hand, unemployment prevalent among younger members of society and a developing trend to distribute available employment by the use of a four day work week pull in the opposite direction. Further, the enactment of the Pension Reform Act of 1974 may be an important factor, concerned as it is with the financial stability of retirement plans and transferability of benefits.

The fact that the legislation requires the Secretary to study involuntary retirement and submit legislative recommendations to the President and Congress shows recognition of the problem by the legislature. It chose to await further data before deciding what, if any, further action is warranted. Legislation need not address itself to all the problems in any given area at one time. Particularly when the effects of a policy are not susceptible to accurate prediction, Congress may well decide that prudence dictates a tentative, experimental approach. It is not the function of the courts to accelerate that process when Congress unquestionably is acting within its proper scope.

In the case *sub judice,* the parties concede that the plan is bona fide and the pension payable not unreasonable—certainly not so small as to brand the plan a subterfuge to evade the purposes of the Act.[20] The sole attack is that

20. *See* Kovarsky, Economic, Medical and Legal Aspects of the Age Discrimination Laws in Employment, 27 VAND. L. REV. 839, 910-912 (1974). In Age Discrimination in Employment Under Federal Law, 9 GA. ST. B.J. 114 (1972), the author postulates that if a plan is not obviously a subterfuge on its face, the question of whether it is bona fide is simply a matter of degree.

The legislative history on the distinctions Congress intended to draw between "subterfuge" and "bona fide" is not helpful. Because the factors which might enter into such categorizations depend upon the factual background, we do not think it advisable to catalogue them in this case.

the plan's retirement at age 60 provision unlawfully discriminates because of age. An employee reaching age 60 may be forced to retire because of that fact, although one who is 59 remains at his job. From that viewpoint, there is obviously discrimination because of age, just as there is in any retirement plan—voluntary or involuntary. But that discrimination, existing because of the terms of bona fide retirement plan, is exempt from the scope of the Act, just as is involuntary retirement at any age beyond 65 or before 40. To summarize, involuntary retirement pursuant to a bona fide plan that is not a subterfuge but which requires or permits retirement at age 60 at the option of the employer is not unlawful.

Accordingly, the plaintiff's contentions must fail, and the judgment of the district court will be affirmed.

United States Court of Appeals
for the Third Circuit
No. 76-1249

WILLIAM F. ZINGER,
Appellant
vs.

ROBERT W. BLANCHETTE, RICHARD C. BOND, and JOHN H. McARTHUR, TRUSTEES OF THE PROPERTY OF PENN CENTRAL TRANSPORTATION COMPANY, DEBTOR; PENN CENTRAL TRANSPORTATION COMPANY

(D.C. Civil Action No. 74-2449)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Present: Adams, Kalodner* and Weis, Circuit Judges

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel.

*Although Judge Kalodner was not present at oral argument, counsel by consent, agreed to his participation in the decision and Judge Kalodner reviewed the record of oral argument.

On consideration whereof, it is now ordered and adjudged by this Court that the judgment of the said District Court, filed December 23, 1975, be, and the same is hereby affirmed. Costs taxed against the appellant.

ATTEST:

Thomas F. Quinn

January 20, 1977 Clerk

CONFLICTING OPINION

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 75-2206

Harris S. McMann, Appellant,

v.

United Air Lines, Inc., Appellee.

Appeal from the United States District Court for the Eastern District of Virginia, at Alexandria, Albert V. Bryan,Jr., District Judge.

Argued June 10,1976

Decided October 1, 1976

Before Haynsworth, Chief Judge, and Winter and Craven, Circuit Judges

Francis G. McBride for Appellant,Carin Ann Clauss, Associate Solicitor, U.S. Department of Labor (William J. Kilber, Solicitor of Labor, Jacob I. Karro, Attorney, U.S. Department of Labor on Brief) as Amicus Curiae; Joseph A. Rafferty, Jr. (Earl G. Dolan on brief) for Appellee.

WINTER, Circuit Judge:

This appeal presents a narrow issue: Does the Age Discrimination in Employment Act, 29 U.S.C. pars. 621, et seq., pro-

scribe the retirement of an employee at age 60 when the retirement is brought about solely because of his membership in an employee's retirement plan which contains a provision making retirement mandatory at that age and when the effective date of the retitement plan preceded the effective date of the Act? The answer to the question turns on whether a preexisting pension plan which requires retirement prior to age 65 falls within the exception contained in 29 U.S.C. par. 623 (f) (2), "[i]t shall not be unlawful for an employer...to observe...any bona fide employees benefit plan...which is not a subterfuge to evade the purposes [of the Act]." The district court thought the exception applicable, relying principally on Brennan v. Taft Broadcasting Co., 500 F. 2d 212 (5 Cir. 1974). Despite Brennan and other authorities, we conclude otherwise. We reverse the summary judgment a-

warded the employer and remand the case for further proceedings.

The relevant facts are largely stipulated. McMann was hired by United Airlines (United) in 1944, and served in various capacities, most recently as a "Technical-Specialist-Aircraft Systems," until his retirement on February 1, 1973. At the time McMann was hired, United had in effect an employee retirement plan, participation in which was voluntary at the option of the employee.[1] Initially McMann

1. We attach no significance to the fact that McMann could have chosen mot to join the plan. Realistically, an employee's decision whether or not to forage lucrative benefits,funded in part by employer contributions he would not otherwise receive, is not "voluntary" in the sense we think it would have to be in order the find a waiver of statutory protection. Moreover, we doubt that Congress intended employees and employers, either iniividually or in collective bargaining, to be able to waive rights granted by the Act. There is little question that an attempt to condition employment itself on the surrender of protection against discharge because of age would be legally ineffectual; we see no reason why participation in a retirement plan should be treated differently.

decided not to join the plan. However, in 1964, he elected to participate. The application card he signed, and subsequent documents he received, showed that the "normal retirement age" for employees in his job category was 60.

While the meaning of the word "normal in this contest is not free from doubt, counsel agreed in oral argument on the manner in which the plan is operated in practice. The employee has no discretion whether to continue beyond the "normal" retirement age. United legally may retain employees such as McMann past age 60, but has never done so: its policy has been to retire all employees at the "normal" age. Given these facts, we conclude that for purposes of this decision, the plan should be regarded as one requiring retirement at age 60 rather than one permitting it at the option of the employer.[2]

McMann was retired at age 60, in compliance with the plan. It is conceded that the plan is "bona fide" in the sense that it exists and pays benefits. United presented no evidence however, to show that the provision of its plan requiring retirement at age 60 had any purpose other than arbitrary age discrimination. It sought and obtained summary judgment solely on the theory that since its plan was indisputably adopted prior to the effect-

2. If we were to treat this plan as one permitting United to retire employees at age 60 or later, at its option, we would face the situation confronted by the court in Brennan, supra. There, Judge Tuttle argued forcefully in dissent that, "at the very least", to qualify for the exemption early retirement pursuant to a plan would have to be compulsory on both the employee and the employer. 500 F. 2d at 220. Judge Tuttle drew support for this conclusion from the statutory language, "it shall not be unlawful for an employer. ..to observe the terms of a bona fide"plan. (Emphasis added.) Arguably, if under a plan the employer has discretion not to retire an employee, the employee's discharge is not action taken "to observe" the terms of the plan.

ive date of the 1967 Act, (June 12,1968) the mandatory retirement provision contained therein was not proscribed.[3]

II.

The Age Discrimination in Employment Act generally prohibits an employer from discharging any individual between the ages of 40 and 65 because of age. 29 U.S.C. pars. 623 (a)(1), 631. However as previously stated, 29 U.S.C. par. 623 (f)(2) provides an exemption from this broad rule.[4] In pertinent part, that section provides that

> /i/t shall not be unlawful for an employer... to observe the terms of a bona fide seniority system or any bona fide employee benefit plan such as a retirement, pension, or insurance plan, which is not a subterfuge to evade the purposes of this chapter, except that no such employee benefit plan shall excuse the failure to hire any individual...

3. Our reversal of United's summary judgment does not finally decide this case even though most of the operative facts have been stipulated. United may have other valid defenses. For example, we note that the Act provides another exemption where age is a "bona fide occupational qualification." 29 U.S.C. par. 623 (f)(1). United may raise this defense on remand. Of course, we express no opinion as to its applicability to McMann, whose principal duties apparently did not involve flying airplanes, but were managerial in nature. We note, however, that the burden of proving the elements required for invocation of any statutory exemption shall be on United. Cf. Weeks v. Southern Bell Tel. & Tel. Co., 408 F. 2d 228, 232 (5 Cir. 1969) (burden on employer to show existence of elements required for bona fide occupational qualification exception under Title VII of the Civil Rights Act of 1964.)

4. United draws our attention to the Secretary of Labor's regulation, 29 C.F.R. par. 860.110, which states that "the Act authorizes involuntary retirement irrespective of age." By its terms, this regulation is interpretive, not legislative. See 29 C.F.R. par. 860.1 (views subject to change in light of court decisions or reexamination by Department of Labor). As evidenced by the Secretary's amicus curiae brief and argument, he has now concluded that the statement in the regulations is erroneous. As we understand the Secretary's present position, it is substantially in accord with the result we reach here.Thus, the regulation has no significance for our decision.We express no opinion as to whether it may provide the basis of a defense under 29 U.S.C. pars. 259, 626 (e).

The only reported appellate decision to construe this section is Brennan v. Taft Broadcasting Co., 500 F. 2d 212 (5 Cir. 1974), decided over a sharp dissent by Judge Tuttle .[5] The Brennan ma-

5. See Note 2, supra. Four other reported cases have discussed the benefit plan exemption. de Loraine v. Meba Pension Trust, 499 F. 2d 49 (2 Cir.), cert. denied, 419 U.S. 1009 (1974), did not deal with the issue presented here. The court explicitly stated: "We also decline to consider at this time the argument of amicus curiae.. that the Act prohibits involuntary retirement pursuant to a pension plan before age 65. As noted in text, plaintiff did not take this position in the district court." 499 F. 2d at 51 n. 7.

Language in Hodgson v. American Hardware Mutual Ins.Co.,329 F.S. 225 (D.Minn. 1971), which tends to support United's position, is plainly dictum.The court stated at the outset of its opinion:"The parties agree that the Plan is a bona fide employee benefit plan within the meaning of ...the Act." 329 F.S. at 227.

Steiner v. National League of Professional Baseball Clubs, 377 F.S.945 (C.D. Cal. 1974), is contrary to our de - cision.But Steiner offers no analysis and relies heavily on the Secretary of Labor's regulation, 29 C.F.R. par. 860.110,which is no longer relevant in light of the Secretary's present position. See note 4, supra.

The fourth case, Dunlop v. Hawaiian Tel. Co.,__F.S.__(D. Hawaii, June 23,1976), is discussed in n. 6, infra.

jority rested its holding on a reading of the "unambiguous language of the statute," 500 F. 2d at 217, and thus disregarded the legislative history and policy considerations which it conceded might support a different result. We believe the language of the statute is clear, but that the Brennan court's interpretation of it is erroneous.

Brennan's only discussion of the "subterfuge"clause in the statute is as follows:

> Taft's "Plan" was effectuated far in advance of the enactment of the law, eliminating any notion that it was adopted as a subterfuge for evasion. 500 F. 2d at 215.

We find this statement unconvincing because what is forbidden is not a subterfuge to evade the Act,but a subterfuge to evade the purposes of the Act.These purposes are clearly spelled out in 29 U.S.C. par. 621 (b), and speak to concerns older

than the Act itself:

> It is ...the purpose of this chapter to promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; to help employers and workers find ways of meeting problems arising from the impact of age on employment.

Thus, in order to qualify for the exemp - tion, a plan must not be a subterfuge to evade the Act's purpose of prohibiting arbitrary age discrimination. Stated otherwise,there must be some reason other than age for a plan, or a provision of a plan, which discriminates between employees of different ages. At this stage of the proceedings, United has offered no non-arbitrary justification for the age 60 retirement provision in its plan.

Any other reading of the "subter - fuge " clause would produce the absurd result that an employer could discharge an

employee pursuant to a retirement plan for no reason other than age, but then could not refuse to rehire the presumptively otherwise-qualified individual,for 29 U.S.C. par. 623 (f)(2) explicitly provides that "no such employee benefit plan shall excuse the failure to hire any individual..."" /C/onceptually there is no difference betwen a mandatory retirement age of sixty-two and a refusal to hire anyone who is sixty-two years old." Hodgson,329 F.S. at 229.

III.

The result we reach is fully consistent with the legislative history. While it is often said that resort to legislative history is inappropriate where the statute is clear on its face,

> When aid to construction of the meaning of words, as used in the statute, is available, there certainly can be no 'rule of law' which forbids its use,how-

> ever clear the words may appear on 'superficial examination! United States v. Anerican Trucking Assns., 310 U.S. 534, 543-44 (1940)(footnotes omitted), quoted with approval in Train v. Colorado Public Interest Research Group, Inc.,__U.S.__,__(No.74-1270, June 1, 1976).

The joint House-Senate report on the section of the age discrimination bill that was to become 29 U.S.C. par. 623 (f)(2) states

> It is important to note that exception (3)applies to new and existing employee benefit plans, and to both the establishment and maintenance of such plans.This exception serves to emphasize the primary purpose of the bill--hiring of older workers-- by permitting employment without necessarily including such workers in employee benefit plans. H.R. Rep. No. 805, 90th Cong., 1st Sess., 2 U.S. Code Cong. & Adm. News, 2213, 2217.

Thus, Congress in drafting the exemption was concerned that requiring equal participation in employee benefit plans by newly-hired older workers could discourage the employment of such workers, since their age would not permit them to accumulate the years of service necessary to make participation in the plans economically feasible. The fact that the exemption contains the proviso "that no such employee benefit plan shall excuse the failure to hire any individual"(emphasis added) confirms that Congress was addressing itself to the problem of the worker hired late in his career, and did not intend to validate plans which discriminate on the basis of age aginst employees such as McCann who have "earned" their benefits through many years of plan membership.

Although we conclude from the legislative history that Congress did not intend retirement plan provisions ever to excuse the failure to hire or the dis -

charge of any individual, but only to permit exclusion of some workers from the plan on the basis of age where exclusion is justified by economic considerations, we recognize that the statute as drafted does permit an employer to discharge employees "to observe the terms of" a plan. However, as we have already observed, in order to escape condemnation as a "subterfuge," an early retirement provision must have some economic or business purpose other than arbitrary age discrimination.

At oral argument, United's counsel conceded that if its plan, with its involuntary early retirement provision, were adopted now, it would probably violate the Act. Thus, its position is that the plan is immunized because it predates the Act. United rests on the Brennan court's conclusion that any action required by a plan predating the Act is valid, since

such a plan could never be a subterfuge. While we have already pointed out the fallacy in this reasoning, it is also refuted by the legislative history. The report states that the exemption "applies to new and existing employee benefit plans, and to both the establishment and maintenance of such plans." It is difficult to reconcile this language with a construction of the statute which would treat new and existing plans differently, automatically validating the provisions of existing plans by refusing to inquire into their purpose. In addition, the legislative history makes it clear that the maintenance of a discriminatory plan is to be considered independently under the exemption. To avail himself of the exemption, an employer must demonstrate that a plan is not being maintained as a subterfuge to evade the Act, as well as showing benign establishment, in order to pre-

vail. United has offered no justification for maintaining its early retirement provision after the Act became effective.[6]

IV.

Our reading of the statute and its legislative history is a realistic one. There are over eleven million employees

6. Brennan's conclusion that the subterfuge clause automatically validates the provisions of all pre-Act plans was rejected in Dunlop v. Hawaiian Tel. Co., note 5, supra, for much the same reason we discuss in the text. However, the Dunlop court upheld a plan permitting involuntary retirement at age 60, based upon an admittedly disingenuous reading of the word "subterfuge" to mean a scheme to retire employees early without payment of substantial benefits. The court felt compelled to reach this result in order to give effect to the Secretary of Labor's interpretive regulation, 29 C.F.R. par. 860.110, discussed in note 4, supra, which it presumed to mirror congressional intent. The court nevertheless observed that Congress might have intended to allow the exclusion of the aged from a retirement plan but not permit the discharge of aged individuals pursuant to a plan as we have concluded, in which case "subterfuge" could be given its normal meaning. Apparently the Dunlop court did not have the benefit of the Secretary's revised position. Accordingly, to the extent that Dunlop relied on the regulation, its authority is weakened.

who are members of retirement plans which require retirement before age 65; there are another several million who are members of plans which permit forced retirement before 65.[7] We think it unlikely that Congress intended to leave the vast loophole in this broad remedial legislation which United would have us fashion. We can forsee no pernicious effects on the nation's employee benefit plans from our decision. Ordinarily, postponement of retirement results in cost savings to a plan providing retirement benefits.[8] If legislative considerations other than an employer's preference for youth justify

7. See U.S. Dept. of Labor, Monthly Labor Review, Vol. 69, No. 4, p. 41 (April 1973).

8. Savings come from two sources. Mortality before retirement eliminates or reduces the benefits payable. In addition, the higher retirement age shortens the period during which benefits will be paid to retirees. M. Bernstein, The Future of Private Pensions, 226 (1964).

the forced retirement of employees before age 65, 29 U.S.C. par. 623 (f)(2), as we construe it, permits such action.

REVERSED AND REMANDED.